

Hirt & Carter (Pty) Ltd v Arntsen N.O and others
[2021] JOL 50544 (SCA)

This is the appeal from the Western Cape Division of the High Court, Cape Town against the finding of Allie, Saldanha, Nuku JJ (sitting as a court of inquest finding) – Ed.

Key words

Civil Procedure – Inquest – Inquest finding – Review application – Alleged error of law

Mini Summary

In 2012, the collapse of scaffolding at a concert held in Cape Town led to several people being injured and one person (Mrs Popa) being killed. An inquest was held in terms of section 5(2) of the Inquests Act 58 of 1959 (the Act) and the magistrate found that the death of Mrs Popa was brought about by an act or omission on the part of the appellant (“Hirt & Carter”), the sixth respondent (“Vertex”) and the fifth respondent (“Bothma Signs”). The dismissal of Hirt & Carter’s application for review of that finding led to the present appeal.

Hirt & Carter was a media company specialising in designing media and advertising campaigns. It was approached by a sponsor of the concert, “GSK”, to assist with a campaign to advertise the sponsor’s product at the concert. Hirt & Carter proposed for the concerts large Lucozade branding on appropriate material wrapped around two towers to be constructed. Hirt & Carter had no experience pertaining to structures to which the branding could be attached and informed GSK that they would approach a third party to erect the structures on which the branding would be placed, accompanied by banners between the two towers. That was how Bothma Signs and Vertex became involved. Vertex erected two scaffolding towers to which Bothma Signs attached the wrapping printed by Hirt & Carter with a banner hung akin to a washing line between the two scaffolding structures. On the day of the concert, strong winds blew over the scaffolding structures to which the banner was attached.

The evidence established that the organiser of the concert had stressed to the relevant person from Hirt & Carter that a safety file was required including a sign-off by a structural engineer. It was common cause that there had been no structural engineer sign-off and that the towers had not been properly secured, causing them to dislodge and fall on concertgoers.

Held that a mistake or error of law does not per se constitute an irregularity in the proceedings, or vitiates a decision at common law otherwise a review would lie in every case in which there was an error on a legal issue. An error of law can, in appropriate circumstances, found a review in terms of the common law. That would be the case when the error is material and affects the outcome of the proceedings.

Hirt & Carter contended that the material error of law by the magistrate was her finding that Hirt & Carter had an obligation to supervise the erection of the scaffolding and manage the safety aspect of the project, which was what led her to make the finding in terms of section 16(2)(d) of the Act. The magistrate was criticised for making a determinative finding in relation to culpability and not adhering to the less stringent prima facie test. However, the present court found that the magistrate could not be faulted for concluding that the death of the deceased was brought about by an act or omission that prima facie amounted to or involved an offence on the part of Hirt & Carter. It was premised on a finding of negligence on the part of Hirt & Carter. There was no discernible material error of law by the magistrate on which a review might be founded.

The appeal was accordingly dismissed.

POTTERILL AJA:

Introduction

[1] At a Linkin Park concert held at the Cape Town Stadium on 7 November 2012 Mrs Florentia Loredana Popa tragically lost her life when scaffolding structures, to which advertising material was attached, collapsed causing open blunt force trauma to her head resulting in her untimely demise. Several other concertgoers were also injured as a result of the scaffolding collapse. Pursuant to this tragedy an inquest was held in terms of section 5(2) of the Inquests Act 58 of 1959 (the Act) and the magistrate found, in terms of section 16(2)(d) thereof, that the death of Mrs Popa was brought about by an act or omission on the part of the appellant (Hirt & Carter (Pty) Ltd), Vertex Scaffolding CC (Vertex) and Maxwill 137 CC t/a Bothma Signs (Bothma Signs), that prima facie involves or amounts to an offence.

[2] Hirt & Carter took the finding of the magistrate on review in the Western Cape Division of the High Court, Cape Town, before three judges. None of the respondents opposed the review application. Bothma Signs filed an affidavit setting out that it was not in a financial position to pursue review proceedings. A Full Court dismissed the review application. It is against that finding, with leave of this Court, that Hirt & Carter is appealing. There was no opposition to the appeal.

[3] The review was brought in terms of uniform rule 53 under the common law and/or read with the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In heads of argument in this Court, it was accepted that Hirt & Carter's application for review may be treated as one in terms of the common law. It was submitted before us that the magistrate had committed a material error of law of the kind that justified the setting aside of the finding referred to at the end of paragraph 1. I intend to deal with that question after having regard to the background, which appears hereafter, including the magistrate's findings based on the evidence adduced before her and the findings of the

Full Court. It should be borne in mind throughout that we are dealing with a review and not an appeal. Much of the background set out hereafter is common cause.

[4] Big Concerts International (Pty) Ltd (Big Concerts) organised the Linkin Park concert at two venues, Johannesburg and Cape Town. Alliance Safety CC t/a Alliance Safety Management (Alliance Safety) was responsible for the safety at the concert.

GlaxoSmithKline (Pty) Ltd (GSK) provided sponsorship. Hirt & Carter, a media company specialising in designing media and advertising campaigns, was approached by GSK who owned the Lucozade energy drinks brand, to assist with a campaign to advertise Lucozade at the two concerts of Linkin Park to be held in Cape Town and Johannesburg. It is necessary to record that there was an established one-year relationship in place between GSK and Hirt & Carter at the time that the latter was contracted to do the Lucozade branding. By the time of the inquest that relationship was four years' old. Hirt & Carter proposed for the concerts large Lucozade branding on appropriate material wrapped around two towers to be constructed. Hirt & Carter had no experience pertaining to structures to which the branding could be attached and informed GSK that they would approach a third party to erect the structures on which the branding would be placed accompanied by banners between the two towers. GSK expected from Hirt & Carter an end-to-end service.

[5] Hirt & Carter approached Bothma Signs to make their concept a reality. Hirt & Carter knew that Bothma Signs was not a scaffolding expert and that this element would be outsourced to a third party. Bothma Signs in turn approached Vertex , a supplier of bespoke scaffolding solutions and contracted Vertex to erect two scaffolding towers for the Cape Town Stadium to which Bothma Signs would attach the wrapping printed by Hirt & Carter with a banner hung akin to a washing line between the two scaffolding structures. On the day of the concert, the notorious Cape winds began to blow and by 7pm its strength increased to such an extent that it blew over the scaffolding structures to which the Lucozade banner was attached.

[6] The evidence pertinent to the conduct of Hirt & Carter is best captured in relation to the evidence of Mrs Pretorius of Sound Media and Mr Olwage of Hirt & Carter.

Mrs Pretorius testified that Sound Media was contracted by GSK to do promotional activities at the concert which practically meant they were tasked to hand out as many Lucozade bottles as they could, as well as presenting other exciting promotions to draw attention to Lucozade. Sound Media offered to do the branding, but Hirt & Carter had already secured this contract. Sound Media was responsible for co-ordinating the efforts of various role-players involved in promoting and conducting the concert. Mrs Pretorius was the point of contact between Big Concerts, GSK and Alliance Safety. She described herself as the communicator between Hirt & Carter and Big Concerts.

[7] Mrs Pretorius's evidence was that Big Concerts had made it clear that safety was everything. She was aware that an engineer's sign-off and a safety file was required for

the scaffolding . Big Concerts sent her an indemnity form, a contractor's agreement and a checklist explaining that the checklist supplied the information necessary for the safety file. Mrs Pretorius was familiar with the need for a safety file from previous projects. At a meeting, a day before the event, Mrs Pretorius handed indemnity forms she had received from Big Concerts to Mr Olwage.

[8] The day before the concert the following emails were exchanged between Mrs Pretorius and Big Concerts with Big Concerts communicating as follows:

"Are These Safety Forms?

Hi, Penny. I just wanted to follow up on this. Have the forms been completed?"

Mrs Pretorius answered as follows:

"Yip. They have and we have a heavy back-up document. The scaffolding the [sic] team have this with them on site."

Mrs Pretorius could not recall how this was discussed with Mr Olwage but she was adamant that she had received this information from him.

[9] On the day of the concert she received an SMS from Mr Olwage stating the following:

"Spoke to Cameron. Got the guys dropping safety docs off. We cannot have someone there 24/7 for scaffolding . This was not discussed with us therefor not costed or arranged with [indistinct]."

In a further SMS, Mr Olwage replied as follows:

"Hi, Penny. I disagree. You made it very clear about the safety docs not someone being on site 24/7 re: scaffolding ."

In a subsequent SMS, Mr Olwage then informed Mrs Pretorius that one of the scaffolding guys was on their way and would look for Lee, an employee of GSK, once there.

[10] Mrs Pretorius testified that she had stressed to Mr Olwage that a safety file was required including a sign-off by a structural engineer. She knew Mr Lord was a safety officer and later learnt he represented Safety Alliance. Mr Olwage had told her that the safety file was with the scaffolding team.

[11] Mr Olwage was a key accounts manager at Hirt & Carter. He testified that Hirt & Carter is primarily a printing facility, including printing large banner designs they conceptualised for advertising and media campaigns. GSK appointed Hirt & Carter as its media advisor with the specific task to create an advertising campaign for Lucozade at the Cape Town Stadium. GSK was an existing client of Hirt & Carter. It was agreed that large wrapping and banners would be designed to be erected at the stadium. The two parties concluded Hirt & Carter's standard trade agreement. Hirt & Carter had to deliver

the banner on a structure. Significantly, when cross-examined by counsel on behalf of GSK, Mr Olwage stated that GSK could rely on Hirt & Carter not only for the branding but in relation to safety as well. That was an obligation that Hirt & Carter had assumed.

[12] Mr Olwage had 19 years' experience of designing media and advertising campaigns and pertinent to this matter, designing and printing large banners. He had no expertise in attaching a designed banner or wrapping to a structure or of constructing scaffolding to which the banner could be attached. He had no knowledge of what legislative requirements needed to be in place at a concert or what was required for safe and secure activations at a concert. He had never had to provide a safety file and did not know what it entailed. Designing and printing did not require him to have this knowledge. Hirt & Carter had no contractual relationship with Vertex , the company that constructed the scaffolding .

[13] Mr Olwage was however, repeatedly made aware that a safety file was necessary. In October 2012, there was a pre-production meeting where safety was discussed. He was in two further meetings where safety was again pertinently on the agenda. He had received an email from Mrs Pretorius asking about dimensions of the scaffolding and stating that the use of scaffolding was acceptable on condition it was signed off by a structural engineer. Mr Olwage could not recall whether at a meeting, a representative of Big Concerts handed Mrs Pretorius indemnity forms. Although he initially denied that Mrs Pretorius informed him that somebody should remain on site 24/7, he later conceded it had slipped his mind and he did in fact recall being told that. He contacted Bothma Signs who contacted Vertex , who in turn deployed Mr Freedom Mdah to stay on site during the concert.

[14] Mr Olwage, in an email from Mrs Pretorius, was made aware that the structures may be affected by the wind. On the morning of the event, 7 November 2012, Mr Olwage had a discussion with Mrs Pretorius about the wind that threatened the stability of promotional gazebos that had been erected. He testified that he left to purchase rods to secure the gazebos. His understanding was that a group of people would, on the day of the concert, walk around the stadium, sign off the site, and take the file where it needed to go. After he left the site the morning of the concert, he received a call from Mrs Pretorius asking for the safety file. Mr Olwage then contacted Mr Swan of Bothma Signs who assured him that the documents were on site. In an SMS sent at 3:50pm, Mr Olwage told Mrs Pretorius that he had spoken to Mr Swan of Bothma Signs and that "the guys" had dropped the file. He had not read the email that asked for the safety file earlier that day as he was with clients and did not check his emails. Whenever Mrs Pretorius asked about the file, he took it upon himself to phone around to find out where the file was; he never said that she should look elsewhere for the file. He himself never saw the file prior to the incident. He knew that a structural engineer sign-off was required.

[15] Mr Olwage acknowledged that all safety issues were to be taken seriously, but said that he relied on the subcontractor, Bothma Signs, to supply the correct documentation and expertise. He did not know if Mr Grant from Bothma Signs knew what a safety file was but hazarded a guess that he did not know. He knew that Bothma Signs were not experts in scaffolding but accepted that the third party that Bothma Signs contracted with, Vertex , were experts in the field of scaffolding .

[16] It is necessary to reiterate that Mr Olwage had repeatedly been informed that safety was important. He was in three separate meetings where safety was discussed. He was, on two occasions asked where the safety file was. Mr Olwage knew there was a requirement that the scaffolding had to be signed off by a structural engineer. Furthermore, Mr Olwage was well aware that the wind was blowing on the day of the event to the extent that he had even purchased rods to secure the gazebos from being blown over. Mr Olwage received queries about the safety file from Mrs Pretorius and forwarded these to his subcontractor. He relayed the answers he received from his subcontractor to Mrs Pretorius and these answers constantly came in the form of an assurance from Bothma Signs, with whom he had a longstanding relationship, that the file was on the site and the file was a "heavy back-up document". Mr Olwage was to provide an end-to-end service to GSK. GSK required a structural engineer's certificate. He knew safety was key and knew that a safety file, with the structural engineer's sign-off, was required. He did not take the time to look at it, more particularly, to look for a structural engineer sign-off, the importance of which had been stressed. Importantly, he admitted when cross-examined that Hirt & Carter undertook to GSK to see to the safety aspect.

[17] It was common cause that there had been no structural engineer sign-off and that the towers had not been properly secured, causing them to dislodge and fall on concertgoers. The inadequacy of the safety measures will become clearer from the findings of the magistrate set out below.

[18] The magistrate in reaching her conclusion referred to the criterion in section 16(2)(c) of the Act, namely, whether the death of the deceased was brought about by an act or omission which prima facie involved or amounted to an offence. The magistrate had regard to Padi and another v Botha NO and others 1996 (3) SA 732 (W) [also reported at [1995] 3 All SA 457 (W) – Ed] where it was held that the Act did not require proof beyond a reasonable doubt and that a judicial officer was not required to make findings as to credibility and acceptability of evidence as in a criminal trial.¹ The magistrate, somewhat inelegantly, stated that findings are to be made on a prima facie basis. In giving reasons for her findings she stated that the "common law offence of culpable homicide, namely the negligent killing of a human being, is also in issue".

[19] The magistrate recounted the evidence in relation to Vertex . She took into account their disregard for essential measures, such as securing the towers to a concrete

platform and not employing, as an alternative, the use of weights and steel wires to keep them secure and stable because those items were not in stock. She held that Vertex was clearly negligent. Hirt & Carter did not take issue with that conclusion.

[20] In respect of Bothma Signs, the magistrate considered that they were well aware of the threat posed by the wind in Cape Town and that a safety file was required. Bothma Signs knew that there had to be a sign-off by a competent person. The magistrate held it against Bothma Signs that they did not even check the security file to confirm that fact. The sign-off was by workmen from Vertex who did not hold a professional qualification. They had only received training by the owner of Vertex . They were the persons who constructed the towers without safety features.

She concluded that they had been negligent. This conclusion too, I did not understand Hirt & Carter to contest.

[21] In so far as Mr Olwage was concerned, the magistrate took into account what is set out about him above, and held that Hirt & Carter was not, in light thereof, entitled to rely on assurances from Bothma Signs.

[22] The magistrate exonerated the South African Police Services, the City of Cape Town, Sound Media, Big Concerts, and Alliance Safety, who admittedly saw their role as assisting with the planning and oversight of safety and security measures. On a conspectus of all the evidence, the magistrate came to the finding that the death of the deceased was brought about by an act or omission that prima facie involves or amounts to an offence on the part of Vertex , Bothma Signs and Hirt & Carter.

The Full Court decision

[23] Before the Full Court, counsel on behalf of Hirt & Carter contended that the magistrate was guilty of a material error of law that vitiated her conclusion in relation to Hirt & Carter. It was submitted initially before the Full Court that the decision by the magistrate was reviewable in terms of the provisions of the PAJA. Counsel on behalf of Hirt & Carter conceded before the Full Court that there was no authority for that proposition. The proposition was rejected by the Full Court.

[24] The Full Court recorded that Hirt & Carter had contended that the error of law on the part of the magistrate, which vitiated the finding against it, was the finding that it had omitted to supervise and manage the erection of the towers, in particular the safety aspect which was the subcontractor's responsibility and which essentially was performed by independent contractors.

[25] The Full Court had regard to the material parts of Mr Olwage's evidence, outlined above. It also had regard to the fact that it had been agreed earlier that the towers would be erected on a solid foundation, rather than on gravel, which is where it was mounted and that Mr Olwage saw that this was the case. The Full Court took into account that

Hirt & Carter had charged GSK a project management fee for the delivery of a safe product, yet all it did was to place reliance on Bothma Signs and Vertex . The Full Court held it against Hirt & Carter that it did not even consider whether the proper certification was in place and did not insist on being given a physical inspection of the structure. The Full Court found that Hirt & Carter, having accepted liability for a safety compliance certificate "was duty bound to ensure that the certificate in fact complied in form and substance with the requisite safety standards".

[26] In the light of its conclusion referred to in the preceding paragraph, the Full Court held that Hirt & Carter's reliance on the subcontractors was misplaced in that one was not dealing with contractual liability. The Full Court proceeded to consider the purpose of an inquest and referred to authority in terms of which a presiding officer need go no further than to ask whether a prima facie case has been established against any person. The Full Court considered common-law grounds of review and took into account that an error of law is not per se enough to vitiate a finding. It has to be material and impact on the outcome. The Full Court held that the magistrate had not misinterpreted any relevant provision of the Act and had not misconstrued her functions and that she had not, even if regard is had to section 22(1) of the Superior Courts Act 10 of 2013, providing for proceedings of any Magistrates' Court to be reviewed on the basis of a gross irregularity in the proceedings, committed any irregularity at all.²

[27] The Full Court in view of the conclusions it reached, dismissed the application for the review and setting aside of the magistrate's findings against Hirt & Carter. The appeal is directed against that order. I now turn to consider whether it was justified.

[28] As presaged above, it is necessary to bear in mind that we are dealing with a review and not an appeal against the magistrate's findings. This Court has stressed that the fundamental distinction between appeal and review must not be blurred or be eliminated and that the time-honoured, and socially necessary separate and distinct forms of relief must be honoured.³ There is, it is clear, no right of appeal against an inquest finding.

[29] A mistake or error of law does not per se constitute an irregularity in the proceedings, or vitiates a decision at common law otherwise a review would lie in every case in which there was an error on a legal issue. See *Hira and another v Booysen* 1992 (4) SA 69 (A) at 85C-F [also reported at [1992] 2 All SA 344 (A) – Ed] with reference to *Doyle v Shenker and Co Ltd* 1915 AD 233, which dealt with a review based on a provision similar to section 22(1)(c) of the Superior Courts Act.⁴

[30] An error of law can, in appropriate circumstances, found a review in terms of the common law. This is so when the error is material and affects the outcome of the proceedings. If, for example, a statutory criterion was wrongly interpreted by a tribunal and on application of the correct approach the facts do not support the impugned

decision, a review ought to succeed. So too, where it can be said that the tribunal asked itself the wrong question or based its decision on some matter not prescribed for its decision or failed to apply its mind to the relevant issues in accordance with the behests of a statute.⁵

[31] Before us it was vigorously contended that the material error of law by the magistrate was her finding that Hirt & Carter had an obligation to supervise the erection of the scaffolding and manage the safety aspect of the project, which was what led her to make the finding in terms of section 16(2)(d) of the Act. The magistrate was criticised for making a determinative finding in relation to culpability and not adhering to the less stringent prima facie test. It was submitted that to hold Hirt & Carter liable in these circumstances would impact negatively on the commercial world especially in relation to subcontracting.

[32] In dealing with these contentions, the purpose of an inquest should be borne in mind. In *Marais NO v Tiley* 1990 (2) SA 899 (A) at 901F-901G the following was said:

"The underlying purpose of an inquest is to promote public confidence and satisfaction; to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences, and so that persons responsible for such deaths may, as far as possible, be brought to justice."

[33] In *Re Goniwe and others (Inquest)* 1994 (3) SA 877 (SE) at 879I [also reported at [1994] 4 All SA 298 (SE) – Ed], the test to be applied in arriving at a conclusion in terms of section 16(2)(d) is dealt with:

"The presiding officer at an inquest need go no further than to ask himself whether a prima facie case has been established. . . ."

And at 880B-D:

"Bearing in mind the object of an inquest it is my opinion that the test to be applied is not the 'beyond a reasonable doubt' test but something less stringent. In my opinion the test envisaged by the Inquest Act is whether the judicial officer holding the inquest is of the opinion that there is evidence available which may at a subsequent criminal trial be held to be credible and acceptable and which, if accepted, could prove that the death of the deceased was brought about by an act or omission which involves or amounts to the commission of a criminal offence on the part of some person or persons."

[34] Having regard to the provisions of the Act and the nature of an inquest, the findings are never finally determinative. There are processes that follow in relation to which there will be further interrogation. In terms of section 17 of the Act the record of proceedings is forwarded by the judicial officer to the Prosecuting Authority. Decisions are made

thereafter and a prosecution might follow or not. If a criminal trial ensues a different evidentiary burden rests on the State. Further evidence will be produced and evaluated.

[35] The magistrate reminded herself, right at the outset, of the prima facie standard of proof that had to be applied in reaching the conclusion envisaged in the Act. The magistrate was careful to consider in detail Mr Olwage's involvement in dealing with safety issues and what factors he, and thus Hirt & Carter, were aware of. The magistrate had regard to email correspondence in which the importance of the structural engineer's sign-off was emphasised. The magistrate took into account against Hirt & Carter that Mr Olwage did not, against all that was within his knowledge, take the time to look at the safety file. He failed to do so, despite having assured others that the safety requirements had been met and despite accepting that Hirt & Carter had undertaken to GSK that it would see to the safety aspects. It did not require any special expertise to look for a sign-off by an engineer. Confirmation of its absence might very well have averted the disaster that ensued. The magistrate was correctly unpersuaded that the subcontracting of Bothma Signs and Vertex, against the facts of the case, could be relied on to exonerate Hirt & Carter.

[36] In my view, the magistrate cannot be faulted for concluding that the death of the deceased was brought about by an act or omission that prima facie amounts to or involves an offence on the part of Hirt & Carter. It was premised on a finding of negligence on the part of Hirt & Carter. There is, in my view, no discernible material error of law by the magistrate of the kind on which a review might be founded. Indeed, I can find no error at all. The flood of potential claims against commercial entities contended for on behalf of Hirt & Carter is illusory. Each case is decided on its own facts and we are here not dealing with civil liability. The magistrate and the Full Court was correct, against the background set out above, not to have its focus deflected by Hirt & Carter's reliance on the subcontractors.

[37] There might well be an oddity in the magistrate's finding that the assurances of Mrs Pretorius to Mr Lord of Alliance Safety rendered Alliance Safety not negligent as "there was no reason for [Mr Lord] to doubt Wilson's [Mrs Pretorius] ability or experience in the field or events, or her assurances that all the necessary documentation had been obtained". However, that was not the issue before us. We were concerned with whether the magistrate's finding against Hirt & Carter was lacking and whether the Full Court order was justified. That question has been answered.

[38] In the circumstances, the following order is made:

1.

The appeal is dismissed.

(Navsa, Mocumie, Dlodlo JJA; Poyo-Dlwati AJA concurred in the judgment of Potterill AJA.)